

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ALAN NISSELSON, Trustee of the	)	
Dictaphone Litigation Trust,	)	
Succesor-in-Interest to claims of	)	
Dictaphone Corporation,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	03-10843-PBS
v.	)	
	)	
JO LERNOUT, et al.	)	
	)	
Defendants.,	)	
	)	
	)	

**MEMORANDUM AND ORDER**

July 21, 2004

Saris, U.S.D.J.

**INTRODUCTION**

Plaintiff Alan Nisselson, Trustee of the Dictaphone Litigation Trust ("Trustee")<sup>1</sup>, brings state law claims of negligence and breach of contract against Chase Securities, Inc. ("Chase"), the financial advisor to Dictaphone in connection with its ill-fated acquisition by Lernout & Hauspie Speech Products, N.V. ("L&H") in May 2000. The Court assumes familiarity with the underlying allegations of securities fraud set forth in In re

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<sup>1</sup> On November 29, 2000, L&H and its subsidiaries (including "New Dictaphone", the post-merger entity) filed for bankruptcy, and pursuant to the Third Amended Plan of Reorganization, the Dictaphone Litigation Trust was established.

Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74 (D. Mass. 2002).

Essentially, plaintiff challenges the reasonableness of Chase's conduct in evaluating L&H's financial reports and its failure to detect the alleged fraud. Dictaphone entered into a written agreement with Chase's predecessor, which provided that Dictaphone "irrevocably and unconditionally submits to the exclusive jurisdiction and venue of any State or Federal court sitting in New York City over any action, suit or proceeding arising out of or related to [the] agreement." The contract also provides that Dictaphone "irrevocably and unconditionally waives any objection to the laying of venue of any such action brought in any such court and any claim that any such action has been brought in an inconvenient forum."

Defendant Chase has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) based, in part, on the forum selection clause. After hearing, the motion to dismiss is **ALLOWED** without prejudice to refiling this action in state or federal court in New York.

## **DISCUSSION**

### **A. Subject Matter Jurisdiction**

As a threshold matter, this Court must determine whether it has subject matter jurisdiction. Although the complaint appears

to assert jurisdiction over Chase pursuant to 28 U.S.C. § 1367 (Am. Compl. ¶ 41), plaintiff Trustee, a citizen of New York, contends that the Court has diversity jurisdiction over Chase pursuant to 28 U.S.C. § 1332 because its principal place of business is California. Chase disagrees, asserting that it was a New York corporation at the time the suit was filed. Based on this sparse record, the Court cannot resolve this dispute. However, any jurisdictional discovery would be pointless because, as both parties agree, the Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Section 1367(a) provides, in relevant part:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Section 1367(c) provides:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances,  
there are other compelling reasons  
for declining jurisdiction.

"[A] Federal court may exercise supplemental jurisdiction over a state claim whenever it is joined with a federal claim and the two claims 'derive from a common nucleus of operative fact' and the plaintiff 'would ordinarily be expected to try them both in one judicial proceeding.'" Vera-Lozano v. Int'l Broad., 50 F.3d 67, 70 (1<sup>st</sup> Cir. 1995) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

The Court has supplemental jurisdiction over plaintiff's state-law claims against Chase because the claims of negligence and breach of contract are closely related to the claims asserted by the Trustee against the L&H defendants under federal securities law. All claims arise out of the same transaction: the sale of Dictaphone to L&H. None of the grounds for declining jurisdiction exists.

#### **B. Forum-Selection Clause**

Defendant argues that the forum-selection clause in the contract should be enforced, and the action dismissed. "Forum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Silva v. Encyclopedia

Britannica Inc., 239 F.3d 385, 386 (1<sup>st</sup> Cir. 2001) (quoting M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972)). In the First Circuit, "a motion to dismiss based upon a forum-selection clause is treated as one alleging the failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6)." Id. at 387. Courts should enforce a forum-selection clause unless the opposing party shows that enforcement "would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching." Breman, 407 U.S. at 15 (enforcing forum selection clause in admiralty case). Courts have generally applied the Breman standard to enforce contractual forum-selection provisions. See 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3803.1 at 20-24 (2d ed. 1986).

Courts have considered several factors in determining whether a forum-selection clause is reasonable, just and freely entered into: (i) the law governing the contract in question; (ii) the place of execution of the contract; (iii) the place where the transactions have been or will be performed; (iv) the availability of remedies in the contractually designated forum; (v) the public policy of the plaintiff's choice of forum state; (vi) the location of the parties, convenience of witnesses and accessibility of evidence; (vii) the relative bargaining power of the parties and the circumstances of their negotiations; (viii)

the presence of fraud or other undue influence; and (ix) the conduct of the parties. See Doe v. Seacamp Ass'n, Inc., 276 F. Supp. 2d 222, 225 (D. Mass. 2003) (citing D'Antuono v. CCH Computax Sys., Inc., 570 F. Supp. 708, 712 (D.R.I. 1983)). The "burden in resisting the forum selection clause is a heavy one." Id.

Plaintiff argues that Stewart Org., Inc. v. Richoh Corp., 487 U.S. 22 (1988), requires this Court to consider the factors used in evaluating a motion for a change of venue pursuant to 28 U.S.C. § 1404(a) in determining whether to enforce the forum-selection clause. In Stewart, the defendant moved the district court to either transfer the case pursuant to 28 U.S.C. § 1404(a) or dismiss the case for improper venue under 28 U.S.C. § 1406. Id. at 24. The Court held that § 1404(a) controlled and stated:

Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice.

Id. at 30. Discussing Stewart in dictum, the First Circuit stated: "had the transferee forum been a United States Court, the applicable standard would be found in 28 U.S.C. § 1404(a)" but held that "since we are dealing with a forum-selection clause

that refers to a forum outside of the United States, and not within the scope of that statute, section 1404(a) does not apply." Royal Bed and Spring Co. v. Famoussul Industria e Comercio de Movers Ltd., 906 F.2d 45, 50-51 (1<sup>st</sup> Cir. 1990) (affirming dismissal of case on grounds of forum non conveniens). Stewart is distinguishable because it held that a federal court faced with a § 1404(a) motion to transfer venue in light of a forum-selection clause should apply the factors articulated by the federal statute, rather than the state policy disfavoring forum-selection clauses. Here, because defendant filed a motion to dismiss rather than a motion to transfer, Silva applies, not Stewart.

Plaintiff argues that the Court should not enforce the forum-selection clause because the claims against Chase are related to the issues in the federal case before the Court. This is certainly true in that plaintiff must prove the financial reports are fraudulent before he can prove that Chase should have detected the fraud. Indeed, the Court's subject matter jurisdiction under § 1367 is predicated on this relatedness. However, the standard for evaluating the enforceability of a forum-selection clause is more stringent; the Trustee has the heavy burden of demonstrating why the forum-selection clause is unreasonable, unjust or not freely entered into.

Plaintiff argues that even taking the forum-selection clause

into account, the relatedness of plaintiff's claims against Chase to plaintiff's other claims, and to the other L&H litigation already pending before this Court, creates a strong judicial interest in retaining this case in the same forum, rather than generating piecemeal litigation. While there is some overlap between the claims against the other L&H defendants and Chase -- i.e., the circumstances of the Dictaphone Merger -- there is no allegation that Chase participated in the fraudulent scheme. The claims against Chase are quite narrow and circumscribed by the contract. In contrast, the claims against the other defendants involve allegations of a sweeping fraud spanning three continents and involving multiple Belgian entities.

Plaintiff's other arguments that enforcement of the forum-selection clause would be unreasonable fall flat. Any discovery burden could be mitigated by coordination between the two districts, and plaintiff only makes a passing, unsupported argument about inconvenience to witnesses. New York is just a shuttle trip away. Thus, even under a section 1404(a) taxonomy (which as a practical matter is not significantly different from the analysis concerning enforceability of a forum selection clause), the factors weigh in favor of enforcing the forum-selection clause.

### **C. Dismissal vs. Transfer**

Alternately, Trustee urges the Court to transfer the action,

rather than dismiss it. Cf. Lipcon v. Underwriters at Lloyd's, 148 F.3d 1285, 1290 (11<sup>th</sup> Cir. 1998) (holding Rule 12(b)(3) provides a more appropriate vehicle through which to assert the motion to dismiss). There is no Silva-lining for the Trustee in this argument because the First Circuit caselaw has not taken that route. See Silva 239 F.3d at 387 n.3, (distinguishing its approach from cases which enforce forum selection claims through motions to transfer based on improper venue); Lamberg v. Kysar, 983 F.2d 1110, 1112 n.1 (1<sup>st</sup> Cir. 1993); LFC Lessors, Inc. v. Pacific Sewer Maint., 739 F.2d 4, 7 (1<sup>st</sup> Cir. 1984).

If the circumstances of the litigation should change, the presence of a valid and enforceable forum-selection clause does not bar a federal court in New York from ordering a transfer back to this Court under 28 U.S.C. § 1404(a). See Wright, Miller & Cooper, Federal Practice & Procedure, § 3801.1 at 27.

#### ORDER

The motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 38) is ALLOWED without prejudice to refiling the action in state or federal court in New York.

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PATTI B. SARIS  
United States District Judge

